No. 12,777

IN THE

United States Court of Appeals

For the Ninth Circuit

FENWAL, INCORPORATED, a corporation,
Plaintiff-Appellant

vs.

W. RAY MONTGOMERY, FREDERICK H. MONTGOMERY and MONTGOMERY BROTHERS, a partnership,
Defendant-Appellees

Appellant's Opening Brief

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Appellant's Opening Brief

STATEMENT OF JURISDICTION

This is an action to recover the purchase price of goods sold and delivered by plaintiff-appellant to defendants-appellees under a written contract. Appellant is a Massachusetts corporation authorized and qualified to do business in California. Appellees are citizens of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000 (Complaint, R. 3-11). The jurisdictional allegations of the complaint are not controverted (Answer, R. 12-20). The District Court had original jurisdiction of this action under 28 U.S.C., Section 1332.

This is an appeal from a judgment of the District Court sustaining appellant's claim but allowing substantial set-

offs asserted by appellees by way of counterclaim (R. 79). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1291. The judgment of the District Court was entered on September 11, 1950 (R. 81) and pursuant to Rule 73, Federal Rules of Civil Procedure, notice of appeal was filed within thirty days thereafter, to-wit, on October 11, 1950 (R. 81).

STATEMENT OF THE CASE

Appellant, Fenwal, Incorporated, manufactures and sells thermostatic controls, so-called thermo-switches, which react to changes in temperature to break or make an electric circuit. These controls have been adapted to and have had considerable use as fire detectors in aircraft (R. 292). Appellees, Montgomery Brothers, do business as manufacturers' representatives. By an agreement dated May 26, 1944, Fenwal named Montgomery its exclusive representative for certain western states, Hawaii and Alaska (R. 5). Montgomery did not become Fenwal's agent. In accordance with a well established business practice the parties arranged for Montgomery to buy Fenwal's products at a discount from list prices and resell those products at a profit to Montgomery's customers. Thus the relation between Fenwal and Montgomery was that of seller and buyer and the contract expressly provided that this relationship and none other was contemplated by the arrangement (R. 8).

When an order for Fenwal switches was obtained by Montgomery, it would place the order with Fenwal (R. 307). Fenwal reviewed the order and if it was satisfactory sent a formal written acceptance to Montgomery (R. 88). Montgomery customarily directed that the goods purchased

by it be shipped directly to Montgomery's customer to whom the materials had been resold (R. 90). An individual invoice was sent by Fenwal to Montgomery for each shipment (R. 91), followed at the end of each month by a summary of the individual billings (R. 91). On or about the 10th of each month Montgomery paid Fenwal for all goods sold during the preceding month (R. 91). Since under this method of doing business Fenwal sold to Montgomery and Montgomery resold to its customers, the obligation to service the orders, that is, to arrange for changes to meet changed specifications, to negotiate in respect to rejections, etc., together with the credit risk, rested entirely with Montgomery. This was, of course, one element considered in fixing the discount rate.

The representation contract provided that it might be terminated by either party on 60 days' notice (R. 8). Fenwal sent notice of termination to Montgomery on December 29, 1948 (R. 96) and the contract was thereby terminated on February 28, 1949. Montgomery acknowledged effective termination of the contract, but asserted that Fenwal must accept all orders placed up to the effective date of termination regardless of when delivery was to be made (R. 99-100). Fenwal replied that this seemed unfair and not in accordance with the contract (R. 105). Thus a dispute developed as to the treatment of orders submitted by Montgomery to Fenwal during the 60 days prior to February 28, 1949, the termination date. The dispute involved orders of three kinds: (a) those accepted by Fenwal and on which Fenwal made delivery to Montgomery while the contract was still in effect; (b) those accepted by Fenwal but on which delivery was not to be made until after the representation contract terminated; and (c) those which Fenwal

did not accept. Orders in the first group, those received during the 60-day period and on which shipment was made during that period, presented no difficulty. They were handled in the ordinary course of business. The sales were completed to Montgomery and it resold to its customers at its customary profit. There was no dispute between the parties and there is no dispute here as to those orders. As to orders to be filled after the contract was terminated, Fenwal believed that such orders should be accepted and delivered only on an upward revision of the price to Montgomery. This was for the reason that the credit risk on such orders and the obligation to service them would rest not on Montgomery, as was customary and contemplated by the representation contract, but on Fenwal (R. 110). Montgomery insisted, however, on its regular price and regular profit (R. 108).

Conferences were held in an effort to resolve the dispute (R. 107-108). Montgomery's representatives introduced into these negotiations a suggestion that Montgomery receive a new appointment as manufacturer's representative for Fenwal products in a reduced area. In the latter part of February, 1949, Montgomery's proposals in that connection and in connection with the pending orders were under consideration by Fenwal (R. 132). Montgomery had not paid for shipments made under its orders by Fenwal during January and Fenwal made demand for the amounts owing (R. 145). Montgomery refused to make the January payment unless and until an arrangement satisfactory to Montgomery had been made in respect to pending orders and future representation (R. 172). Fenwal renewed its demand for payment advising Montgomery that no further shipments would be made unless the amounts due were

forthcoming (R. 182). Montgomery did not pay and the shipments stopped. On March 3, 1949, Fenwal returned the Montgomery orders which had not been accepted and advised Montgomery that on account of the failure to pay for past shipments no further shipments would be made on orders already accepted but only partially filled (R. 184).

This placed Montgomery in a difficult position. Montgomery had contracts outstanding to resell the products on order from Fenwal (R. 175). Without the Fenwal shipments Montgomery faced substantial claims for breach of contract. Fenwal, on its part, naturally wanted to continue to place its products with Montgomery's customers and, accordingly, an arrangement was worked out whereby Montgomery's contracts to sell to its customers, particularly the California aircraft companies, were assigned to Fenwal. Under the assignment Fenwal agreed to supply the products which Montgomery had undertaken to supply and to assume all of Montgomery's obligations with respect thereto (R. 54-66). At the suggestion of Montgomery it was agreed by the parties that the assignment arrangement should not affect their rights with relation to each other (R. 67).

When Montgomery persisted in its refusal to pay for goods already shipped, Fenwal brought this action. Montgomery counterclaimed for the profit it would have obtained if Fenwal had filled all orders, accepted and unaccepted, placed with it by Montgomery prior to the termination of the representation contract. Montgomery's profits on all such orders would have been $36,525.20, assuming no cancellations, and on the same assumption the profit on orders accepted but only partially filled would

have been $17,361.46 (R. 72). Montgomery also claimed an additional $75,000 from Fenwal on a charge that Fenwal had improperly hired a Montgomery employee away from Montgomery, but the court below rejected this claim and Montgomery has dismissed its appeal from that portion of the District Court's order.

The indebtedness from Montgomery to Fenwal for goods sold and delivered, amounting to $46,635.40, is undisputed. Thus the question for decision is whether Montgomery is entitled to the profit which it claims it would have realized had Fenwal accepted and filled all Montgomery orders.

SPECIFICATION OF ERRORS

1. The Court erred in making and entering its findings of fact set forth in Paragraph IV of the Findings of Fact and Conclusions of Law, which said paragraph reads as follows (R. 77-78), to-wit:

IV

> "That it is true that certain orders were placed by defendants with plaintiff prior to February 28, 1949. That said orders were accepted by plaintiff, filled and delivered by said plaintiff after February 28, 1949, which resulted in a financial benefit to said plaintiff in that plaintiff realized a profit on the articles so sold and delivered, and further benefited by the continuation of business between the plaintiff and the buyers thereof; that the services rendered by defendants in obtaining and filing of said orders with plaintiff were not gratuitously performed. That pursuant to the stipulation of the parties hereto filed July 14, 1950, the profits of defendants upon all orders obtained by the defendants and filled by the plaintiff would be $36,-525.20.

"That said sum of $36,525.20 represents the profits which defendants would make on the resale by defendants to their customers of goods shipped to said customers under orders placed by defendants with plaintiff prior to the effective date of termination of said contract and accepted by plaintiff. Shipments of said goods were made by plaintiff to defendants' said customers under an assignment from defendants to plaintiff, which said assignment was made without waiving the rights of either defendants or plaintiff."

for the reason that said findings are contrary to the evidence in that the evidence is to the effect that a portion only of the orders was accepted by plaintiff and the balance of said orders was rejected by plaintiff; that pursuant to stipulation of the parties, filed herein on July 14, 1950, the sum of $17,361.46, and not the sum of $36,525.20, represents the profit which defendants would make on the resale by defendants to their customers of goods shipped to said customers under orders placed by defendants with plaintiff prior to the effective date of termination of the contract and accepted by plaintiff.

2. The Court erred in deciding that defendants are entitled to their profit on all orders accepted, on a quasi-contract basis—benefit to plaintiff.

3. The Court erred in concluding that defendants are entitled to an offset in the sum of $36,525.20 against the amount plaintiff is entitled to recover from defendants, to-wit, the sum of $46,635.40, and in failing to conclude that the defendants were not entitled to any offset whatsoever.

4. The Court erred in rendering judgment in favor of plaintiff for the sum of $10,110.20 with costs to neither party, and in failing to render judgment in favor of plaintiff for the sum of $46,635.40 with interest and costs.

5. The Court erred in allowing defendants to offset profits in the sum of $36,525.20 and in failing to consider that there should be deducted from said profits the cost to plaintiff of servicing the orders on which said profits were allowed.

SUMMARY OF ARGUMENT

Montgomery owed Fenwal $46,635.40 for goods sold and delivered. This is admitted. Montgomery claims against Fenwal by way of setoff $36,525.20 on account of the profit it would have received if Fenwal had accepted and filled all orders placed by Montgomery prior to February 28, 1949, the effective date of the termination of the contract between the parties. The court below improperly allowed this claim in full.

The refusal of Montgomery to pay for goods previously shipped excused Fenwal from further performance. A seller is under no obligation to make further deliveries to a buyer who has breached the contract by refusing to pay for goods already shipped or has committed an anticipatory repudiation of the contract by indicating in advance that he will not pay.

The ruling below that Fenwal has a quasi-contractual obligation to Montgomery is without foundation. No such claim was asserted by Montgomery and no such obligation exists. Fenwal's refusal to ship after Montgomery had refused to pay was both prudent and lawful. An exercise of lawful rights results in no quasi-contractual obligation. Nor did the sales to the aircraft companies under the assignment arrangement impose quasi-contracautal duties on Fenwal. First, it was expressly agreed that the assignment arrangement should not affect the rights of the parties. Second, the deliveries to the aircraft companies were in dis-

charge of Montgomery's obligation to those companies, and a discharge by Fenwal of Montgomery's obligations could hardly require Fenwal to compensate Montgomery. Third, the assignment arrangement was carefully phrased in writing and it made no provision whatever for any payment from Fenwal to Montgomery.

ARGUMENT

The Court below did not undertake to say that Fenwal had violated any contractual obligation to Montgomery. There was obviously no basis for any such conclusion. On the other hand, the trial court, in deciding that Montgomery was entitled to recover from Fenwal on a quasi-contract basis, necessarily concluded that Montgomery's refusal to pay for goods previously shipped constituted a breach of the contract which precluded a recovery by Montgomery on the contract. The action of Montgomery, in refusing to make payment for goods already delivered unless its demands in other connections were met, plainly relieved Fenwal from any obligation to make further deliveries or accept further orders. The contract was silent as to time of payment (R. 5). The legal effect of the contract was, therefore, to make the price of the goods payable on delivery unless the parties, by their conduct, agreed that the writing should be modified in its legal effect in this particular. *Uniform Sales Act* § 42 (Civ. Code of Cal. § 1762; Chap. 106, § 31, General Laws of Mass.) provides:

> "§ 42. *Delivery and payment are concurrent conditions.*—Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange

for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

See also *National Contracting Co. v. Vulcanite Portland Cement Co.,* 192 Mass. 247, 78 N.E. 414 (1906); *United Canneries of California v. Seelye,* 48 Cal.App. 747, 192 Pac. 341 (1920); *Southern Pacific Milling Co. v. Billiwhack Stock Farm,* 50 C.A.2d 79, 122 P.2d 650 (1942). The Fenwal acceptance form provided, however, credit terms of "½% discount for cash within 10 days of date of invoice, 30 days net, interest after 30 days" (R. 93) for customers with approved credit, including Montgomery. These credit terms, it will be noted, did not specifically state the due date of payment but only the consequences of paying upon the described dates. The ambiguities in the situation were, however, effectively and conclusively resolved by the conduct of the parties. It was the established and accepted practice of the parties for payment to be made on the 10th of each month for all shipments made during the preceding month. The record is clear and unequivocal. See, for example, Montgomery's letter to Fenwal of May 20, 1947, saying in part, "We religiously pay all our accounts on the 10th of the month" (R. 151); Fenwal's letter to Montgomery of June 13, 1947, saying in part, "We have not, as yet, received your remittance for May and are wondering if this was sent on the 10th of the month as you had previously stated it would be" (R. 156); Montgomery's letter to Fenwal of June 20, 1947, saying in part, "We also wish to state that we will continue to send our check promptly on the 10th of the month if you will see that your statement is mailed to us in time for us to check the bills by that time"

(R. 158); and subsequent correspondence (R. 165, 167, 170). See, also, the testimony of W. Ray Montgomery on cross examination (R. 390) which is quoted as follows:

> "Q. Now, we touched this morning upon the date of payment. There wasn't any question, was there, that the regular date of payment of your account with Fenwal Company was the 10th of each month?
>
> A. No, sir.
>
> Q. It was the 10th of the month regularly as the routine business of the two organizations?
>
> A. That is right."

The resolution by the parties of the ambiguities of their contract is, of course, controlling here. *Phillips Petroleum Co. v. Gable,* 128 F.2d 943 (C.C.A. 10, 1942); *Franklin Fire Ins. Co. v. C. & O. Ry. Co.,* 140 F.2d 898 (C.C.A. 6, 1944); *Universal Sales Corp. v. Cal. Press Mfg. Co.,* 20 C.2d 751, 128 P.2d 665 (1942); *Woodbine v. Van Horn,* 29 C.2d 95, 173 P.2d 17 (1946); *Maxwell-Davis, Inc. v. Hooper,* 317 Mass. 149, 57 N.E.2d 537 (1944); *Atwood v. City of Boston,* 310 Mass. 70, 37 N.E.2d 131 (1941); Restatement, Contracts, Section 235(e).

This meant that the balance due for shipments during January, 1949, became due February 10, 1949. That balance was not paid. About ten days later, Fenwal inquired about the January balance (R. 145). Montgomery replied and refused to pay (R. 74). The refusal, moreover, was not on the ground that the payment was not owing—the debt was not disputed—but rather on the ground that Montgomery preferred to "withhold January check until future relations are established as suggested in our letter February 6 *Y* 15" (R. 172). This attempt to coerce Fenwal into agreeing to Montgomery's demands with respect to a new representa-

tion agreement totally failed. Fenwal quite properly refused to be thus forced, politely, into accepting Montgomery's terms for the new arrangement. Fenwal renewed its demands (R. 174), and when payment was not forthcoming, it returned to Montgomery all unaccepted orders and stopped all further shipments on accepted orders (R. 185-189).

The Fenwal action was fully justified. It is settled that a seller need not complete contract shipments if payment for goods already delivered is past due and not forthcoming. *Ackerman v. Santa Rosa-Vallejo Tanning Co.,* 257 Fed. 369, 372 (C.C.A. 9, 1919); *Swinehart Tire & Rubber Co. v. William Whitman Co.,* 266 Fed. 45 (C.C.A. 6, 1920); *Hayden Bros. v. Columbia Medallion Studios,* 64 F.2d 44 (C.C.A. 8, 1933); *First National Bank of Litchfield v. Pipe & Contractors' Supply Co.,* 273 Fed. 105 (C.C.A. 2, 1921); *Samuels v. W. H. Miner Chocolate Co.,* 235 Mass. 312, 126 N.E. 771 (1920); *Minaker v. California Canneries,* 138 Cal. 239, 71 Pac. 110 (1902); *Curtis v. Nye & Nissen,* 86 Cal. App. 507, 515, 261 Pac. 747, 750 (1927); *Daniels v. Newton,* 114 Mass. 530, 533 (1874); *National Machine & Tool Co. v. Standard Shoe Machine Co.,* 181 Mass. 275, 63 N.E. 900 (1902); *Hadfield v. Colter,* 177 N.Y.S. 382 (App. Div. 1919); *Lewis v. Southern Mills,* 53 F. Supp. 443, 451-52 (W.D. N.C. 1944).

Nor is this all. Montgomery in refusing to pay had made it plain that Fenwal could expect nothing until Montgomery's demands with respect to a new representation contract were accepted (R. 172). This amounted to a repudiation by Montgomery of its contractual obligations, which relieved Fenwal of any duty it might otherwise have had

to make shipments. Thus, even if it could be said that the January balance was not due, Montgomery's declaration that no payment would be made until its terms on the new contract were met relieved Fenwal of all obligation to Montgomery. Fenwal could hardly have been expected to continue to ship after Montgomery had announced that the goods would not be paid for and the unpaid balance would be used as a weapon to compel Fenwal to agree to Montgomery's demands for a new contract. The law imposed no such obligation on Fenwal. On the contrary, it is well settled that if one party announces that he does not expect to comply with the contract, the other party is discharged of his obligations under the agreement. Civil Code of California, Section 1440 provides:

> "§ 1440. *When performance, etc., excused.* If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."

See also, *Southern Pacific Milling Co. v. Billiwhack Stock Farm,* 50 C.A.2d 79, 122 P.2d 650, 654 (1942); *Bu-Vi-Bar Pet. Corp. v. Krow,* 40 F.2d 488 (C.C.A. 10, 1930); *Daniels v. Newton,* 114 Mass. 530 (1874); *Cowan v. Tremble,* 111 Cal. App. 458, 296 Pac. 91 (1931); 12 Am. Jur. 959, Contracts, Section 382; 3 Williston on Sales, 258, Section 585e. Nothing done by Fenwal constituted a violation of its contractual obligations to Montgomery.

It is equally true that Fenwal has no quasi-contractual obligation to Montgomery. The action taken by Fenwal with respect to the Montgomery orders was an exercise by Fenwal of its legal rights. The exercise of rights conferred by law creates no quasi-contractual obligation. The law, conferring on Fenwal the right to make no further shipments to Montgomery, does not at the same time require Fenwal to compensate Montgomery just as though Fenwal was obligated to make such shipments and improperly refused to do so. Nor does any quasi-contractual obligation arise from the assignment transaction. That transaction was an entirely independent arrangement entered into after the representation contract was terminated and after Fenwal had stated that it would, for the reasons assigned, make no further shipments to Montgomery. The assignment transaction was, moreover, at least as advantageous to Montgomery as to Fenwal. Montgomery had enforceable contract obligations to its customers to deliver Fenwal products to them (R. 175-176). If it could not obtain those products, it was in serious danger of becoming liable in damages. It was greatly to Montgomery's advantage for Fenwal to accept an assignment of Montgomery's contracts and to undertake to fulfill Montgomery's obligations.

By its unjustified refusal to pay for shipments previously made, which resulted in Fenwal's proper refusal to make further shipments, Montgomery placed itself in a position where it could not perform its contract commitments to its customers, including the aircraft companies. The assignment arrangement relieved Montgomery from this embarrassment. That did not give rise to any quasi-contractual right by Montgomery against Fenwal. The foundation for quasi-contractual relief is an unjust enrichment of the de-

fendant at the expense of the plaintiff. If there has been no injustice to plaintiff, there can be no quasi-contractual recovery even though the plaintiff had been enriched or benefited. *Restatement of Restitution,* Section 1, p. 13; *Bailis v. R.F.C.,* 128 F.2d 857, 859 (C.C.A. 3, 1942). Here there has obviously been no injustice to Montgomery. On the contrary, the assignment transaction was greatly to the benefit of Montgomery and Montgomery has in that connection no grievance. The injustice which is the foundation for every quasi-contractual obligation is not present.

Fenwal has no quasi-contractual obligations to Montgomery for a second reason. The assignment arrangement was evidenced by formal written contracts carefully phrased by the parties (R. 54-67). These agreements did not include any arrangement whatever for Fenwal to pay Montgomery for the privilege of discharging Montgomery's obligations to its customers (R. 54-67). When parties to a transaction have carefully phrased in writing their respective rights and obligations, there is no room for a court to create additional quasi-contractual obligations. *Haber v. Bond Stores,* 178 F.2d 836, 839 (C.C.A. 6, 1949); *Martin v. City of Port Huron,* 111 F.2d 759, 761 (C.C.A. 6; 1940); *Wolfe v. Prairie Oil & Gas Co.,* 83 F.2d 434 (C.C.A. 10, 1936); *Ogden v. Ruhm,* 7 F.2d 1007, 1009 (C.C.A. 2, 1925); *Bechtel v. Chase,* 156 Cal. 707, 712, 106 Pac. 81, 83 (1909); 17 C.J.S. 321, Contracts, Section 5.*

Finally, there is the fact that Montgomery and Fenwal expressly agreed that the assignment transaction should

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*The court below provided Montgomery with quasi-contractual rights which Montgomery had never asserted and which did not exist. The court measured those rights, even if they existed, in a fashion which was plainly erroneous. The court awarded to Montgomery its full profit on the controversial orders. Quasi-contractual

not affect their rights with relation to each other (R. 67). That agreement preserves the rights of the parties as if the situation had remained at rest after March 3, 1949, that is, as if Fenwal had returned the unaccepted orders, made no further shipments on accepted orders and no further action had been taken.

This brief has pointed out that Montgomery has no rights under such circumstances. The court below was in error in recognizing any claim by Montgomery against Fenwal.

CONCLUSION

The judgment below should be reversed with directions to the court below to enter judgment for appellant for $46,635.40 with interest and costs.

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Respectfully submitted,

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recovery at best is limited to the reasonable value of the service—as to which Montgomery produced no evidence—less the expense reasonably incurred by the defendant—in this case the expense to Fenwal of servicing the Montgomery orders. See 71 C.J. 172, Work and Labor, Sec. 155(2); *Oakley v. Duluth Superior Dredging Co.*, 223 Mich. 478, 194 N.W. 123 (1923); *Shallis v. Fiorito*, 41 Ida. 653, 240 Pac. 932 (1924); *Viles v. Kennebec Lumber Co.*, 118 Me. 148, 106 Atl. 431 (1919). Thus the decision below cannot stand for the single reason, if for no other, that the measure of recovery allowed to Montgomery is totally in error.